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Rethinking Judicial Elections

Charles G. Geyh
Indiana University Maurer School of Law, cgeyh@indiana.edu

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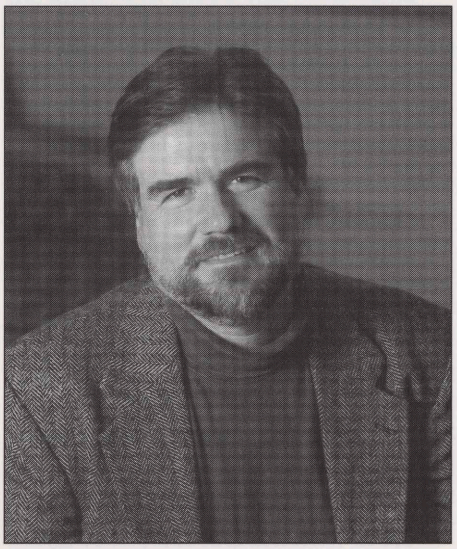
For the past several years, I have been working with a number of organizations in an effort to address problems relating to judicial independence and accountability that have arisen in different states across the country. Of particular concern to the organizations with which I have worked are judicial elections, where many of the most serious challenges to judicial independence have occurred. Having toiled in the trenches for several years now, I find that I am rapidly reaching my "Popeye" threshold, which is to say that "I've had all I can stands, I can't stands no more." Although I regard incremental efforts to reform judicial elections as valuable, I have reached the conclusion that judicial elections are fundamentally incompatible with judicial independence and fundamentally incapable of adequately promoting judicial accountability. The time has come to rethink judicial elections, to the end of gradually phasing them out of existence altogether.

In this paper, I will first explain why judicial elections are properly the center of attention for anyone who is concerned about protecting judicial independence and promoting judicial accountability within state judicial systems. Second, I will describe four political realities that together comprise what I call the "axiom of 80" and that complicate considerably judicial election reform efforts. Third, I will review recent incremental reform proposals aimed at ameliorating some of the independence-threatening effects of judicial elections that have been advanced in the shadow of the axiom of 80. Fourth, I will argue that these incremental reform efforts are ultimately doomed to failure, because judicial elections are incompatible with preserving judicial independence and promoting judicial accountability. Fifth, and finally, I will attempt to lay out a blueprint for the future, in which judicial elections may gradually be phased out of existence in favor of a purely appointive model of judicial selection.

Why focus on judicial elections?

Before launching into a discussion of the threats to judicial independence that have occurred in various states over the course of the past several years, it probably makes sense to define judicial independence as I am using the phrase here. For my purposes, judicial independence has two distinct meanings. First, it refers to the capacity of a judge to decide cases according to the facts as she finds them and the law as she conceives it to be written, without inappropriate external interference ("decision-making independence"). Second, it refers to the capacity of the judiciary as a separate and independent branch of government to resist encroachment from the political branches and thereby preserve its institutional integrity ("institutional independence"). In both cases, judicial independence is not an end in itself, but an instrumental value designed to protect the rule of law.



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Charles G. Geyh

Threats to judicial independence are by no means confined to judicial elections. For example, in New Hampshire, the legislature proposed to strip the supreme court of jurisdiction to hear cases relating to the funding of public schools, following an unpopular decision of the court on that subject. In several states, constitutional amendments have been introduced to limit the judiciary's power to declare legislative enactments unconstitutional. In Maryland and other states, angry legislators have threatened to slash the budgets of various courts in response to judicial decisions with which the legislators disagreed. In Florida, proposals were floated to pack the courts, i.e., to enlarge the size of the court so as to affect its judicial decision-making majority. And in several states, legislators have threatened to bring impeachment

actions against judges whose decisions have offended them.

As troubling as these threats may be, they have materialized only rarely. In some cases, as with impeachment, the weapon used to threaten the courts has proven too cumbersome to use. In other instances, these devices have been deemed at odds with well-established norms that respect the role of an independent judiciary in state government, and have not garnered the support necessary to become law.

Judicial elections are another matter. Supreme court justices in Idaho, Mississippi, Nebraska, Tennessee, and elsewhere have lost re-election or retention bids on account of unpopular decisions they have made in isolated cases. Judges in many more jurisdictions have encountered intense opposition to their re-election or retention on account of decisions in cases involving a range of issues, including the death penalty, tort reform, products liability, education funding, and abortion. In assessing the threat posed to judicial independence, it does not matter whether the judge was actually defeated; rather, what matters is whether the judge felt her tenure threatened in ways that could affect her capacity to decide a case according to the law rather than according to her "constituents'" preferences.

The unprecedented sums that sitting justices must now raise in order to fend off challenges to their retention or re-election suggest that judicial elections have, indeed, become ground zero in the political battle to influence judicial decision making. The cost of an average supreme court race has increased by more than 100 percent since 1994. In the 2000 election cycle, nine supreme court races cost more than a million dollars each. The escalating cost of judicial elections has precipitated additional judicial independence concerns. Judges who are forced to raise increasing sums of money to defend themselves against challenges to their continuation in office on the basis of their decisions in isolated cases must raise money from lawyers who will appear before them and from organizations with an interest in the outcomes of cases the judges decide. This, in turn, creates a public perception that judges may be influenced by the campaign contributions they receive — a point not lost on single-issue voter groups, who campaign for the defeat of incumbent judges on the grounds that those judges have not only made bad decisions but have done so to curry favor with special interests.

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Judicial independence problems and the axiom of 80

If we accept that judges ought to be independent, that they ought to decide cases on the basis of the law as they construe it without fear of the electorate or favor to their contributors, then the developments described in the preceding section are very unsettling. Efforts at reform are hampered, however, by four political realities that together constitute what I characterize as the "axiom of 80."

- First, 80 percent of the public favors selecting judges by election. In other words, support for judicial elections is deeply entrenched, and that entrenched support may constitute the single most significant impediment to meaningful reform of the election process.
- Second, despite widespread public support for judicial elections, as much as 80 percent of the electorate typically does not vote in judicial elections. When judicial elections are the only item on the ballot, voters stay home; and when judicial elections share the ballot with political branch races, there is a demonstrable "roll-off" in which a significant percentage of voters who cast ballots in the political branch races decline to vote in the judicial races.
- Third, as much as 80 percent of the public — including many who cast ballots in judicial elections — are unfamiliar with and unable to identify the judicial candidates. This high level of voter ignorance may help to explain the equally high level of public apathy described in the second political reality: Voters who are unfamiliar with the candidates may see no point in voting.
- Fourth, despite entrenched public support for judicial elections generally, 80 percent or more of the public perceives that when a judge is obligated to raise the monies needed to win election or re-election, she is influenced by the campaign contributions she receives.

Incremental reform in the shadow of the axiom of 80

The public's longstanding support for judicial elections, as embodied in the first political reality of the axiom of 80, has caused reformers to concede their inevitability. Once the inevitability of judicial elections is conceded, then the remaining three political realities — voter apathy, voter ignorance, and the public perception that judges are influenced by their campaign contributors — become additional problems with which to reckon. And so, reform efforts have tended to tinker around the edges.

To circumvent the impact of the first political reality, many states have sought to implement a "merit selection" process, in which the governor appoints judges from a pool of candidates approved by a commission that has evaluated them on the basis of merit. Even then, merit selection systems concede the inevitability of elections by requiring that judges so appointed periodically stand for retention elections. To reduce the voter apathy and ignorance reflected in the second and third political realities, reformers

have proposed the use of voter guides and judicial performance evaluations; to cope with the fourth political reality that the public thinks judges are influenced by their contributors, reformers have proposed public financing of judicial campaigns and limits on the contributions that judges may receive. Numerous other proposals have been developed, but one theme remains constant: Elections are an inevitability, and reform can go no further than to tweak and massage judicial selection in the permanent shadow cast by elections.

Incremental reform unlikely to yield lasting results

Without disputing the importance of these incremental reform efforts, I do not think that they can yield lasting improvements, because judicial elections are ultimately antithetical to judicial independence and unable to adequately promote judicial accountability. As far as judicial independence is concerned, my argument is relatively straightforward: Asking judges to decide cases impartially and without regard to the whims of the majority is fundamentally incompatible with a system that lets the whims of the majority decide whether the judge stays in office. Heroic judges can and have made impartial rulings in the teeth of public clamor, but the success of our judicial system should not be made to depend on all judges being heroes.

With respect to the accountability side of the equation, one relatively obvious point is that if only a few people can identify the candidates, and only a few people vote, can elections really hold judges accountable in any meaningful way? A second, less obvious, point is that unlike governors or legislators, judges must be professionals: Every state that elects its judges requires them to be lawyers. No comparable requirement exists for representatives of the political branches. That makes sense: Judges have to decide what the law is, and that requires specialized expertise. But how are voters supposed to assess the professional competence of judges? It is one thing to expect voters with no training in the law to decide whether the policies favored by legislators and governors (who may not be lawyers themselves) coincide with their own, and quite another to expect them to decide whether the rulings of judges coincide with the law.

In the context of professional malpractice litigation, for example, it is ordinarily assumed that a lay jury cannot assess the professional competence of a doctor or lawyer without the assistance of expert witnesses. In judicial elections, then, if we are to hold out any hope for voters being able to inform themselves sufficiently to cast an intelligent vote for judges, they will need even more information than they require to cast an informed vote in political branch races.

Ironically, however, voters have access to considerably less information in judicial races. The judicial code of conduct has traditionally imposed substantial limits on what information judicial candidates may communicate to their voters. Judicial candidates may not comment on pending cases; they may not make statements that appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court; and they may not make pledges or promises of conduct in office. Voters have thus been left to receive what information they can, largely from single issue voter groups that run independent advertising campaigns — not precisely a reliable source of relevant data.

For better or worse, the information shortfall in judicial elections may soon be ending. In *Minnesota Republican Party v. White*, a 5-4 majority of the U.S. Supreme Court invalidated, on First Amendment grounds, a code of judicial conduct provision that prohibited judicial candidates from taking positions on issues likely to come before them later as judges. In so holding, the court created considerable uncertainty concerning the continuing validity of code of judicial conduct constraints on judicial campaign speech.

The good news, such as it is, is that judicial candidates may now be much freer than in the past to communicate their views to voters and so more fully inform them. The bad news is that in so doing, judicial impartiality may be hopelessly compromised. The Supreme Court did not see it that way. Justice Scalia, writing for the five-member majority, did not accept the argument that a ban on judicial candidate position-taking would promote judicial impartiality. In the majority's view, judicial candidates would feel no special need to adhere to positions on issues that they took as judicial candidates after they had ascended the bench and begun to decide those very issues. The court reasoned that the code of judicial conduct did nothing to prevent candidates from taking positions on issues before they became candidates — as lawyers, law professors, and public officials. To bar them from taking positions on issues in judicial campaigns would do little, if anything, to protect impartiality, Chief Justice Scalia concluded, because judges would feel no greater need to follow their campaign positions than positions they had taken previously in their former professional lives.

The court's analysis is problematic at best, for reasons explained by Justice Scalia himself, not in the context of the majority opinion in *White* but in his capacity as a judicial nominee answering questions before the Senate Judiciary Committee in 1986. There, he declined to take positions on issues that might come before him as a judge, on the grounds that it would compromise his impartiality. When asked for his views on the equal protection clause, for example, then-Judge Scalia replied: "The only way to be sure that I am not impairing my ability to be impartial in future cases … before the court is to simply respectfully decline to give an opinion on whether any of the existing law on the Supreme Court is right or wrong." In response

to Justice Scalia's argument in *White* that a judge is no more likely to compromise his future impartiality by taking a position on an issue during the campaign than by taking such a position at an earlier stage in his career, candidate Scalia likewise had an answer. In rebuffing inquiries into his position on abortion, he explained: "I think it is quite a thing to be arguing to somebody who you know has made a representation in the course of confirmation hearings, and that is, *by way of condition to his being confirmed*, that he will do this or do that. I think I would be in a very bad position to adjudicate the case without being accused as having a less than impartial view of the matter (emphasis added)."

In other words, the position a judicial aspirant takes before the group that will decide whether he becomes a judge is uniquely important, because that position will be treated as a condition of his selection. For that reason, judges will obviously feel greater need to adhere to the positions they take during judicial campaigns than at earlier stages of their careers, and on that score Justice Scalia's rejection of candidate Scalia's analysis is simply baffling.

Although the scope of the court's decision in *White* remains uncertain, there is no denying that it will put additional pressure on judicial candidates to take positions on issues they are likely to decide as judges, and, in so doing, create the impression with the public that they have already decided those issues before the case is even filed. Within a matter of weeks of the decision in *White*, an Indiana lawyer had circulated a questionnaire to state judicial candidates asking them whether they "believe" that the Indiana Constitution protects the right to an abortion, the right to assisted suicide, and related questions. Although judges are not required to answer such questionnaires, the pressure to do so in close races will be considerable, given that those demanding answers can now assert that the judge is hiding behind a defunct ethical prohibition. And when judges do give answers, single-issue voter groups disappointed with the positions a judge has been pressured into taking can be anticipated to launch attack campaigns of their own, thereby increasing the likelihood that judicial retention or re-election will turn on whether a judge's construction of the law on a single issue is popular with the voters.

"To gain traction with the public, judicial selection must achieve the status of a movement."

A blueprint for gradually phasing out judicial elections

With judicial elections in a state of free fall, the time is now to do something about it. If, for the reasons elaborated upon above, we accept that judicial elections are undesirable in principle, then our focus should be on devising a long-term strategy for phasing them out. Any such strategy should keep the following considerations in mind:

• *Patience:* The great social, political, and cultural movements of the 20th century did not run their course overnight. The women's suffrage movement, the anti-war movement, the civil rights movement, and the environmental movement all took decades and, in some cases, generations to run their cycle. Entrenched public support for judicial elections will not disappear quickly, and any movement to end judicial elections must take that into account.

• *Efforts to end judicial elections must be treated as a movement:* My foregoing comparison of a proposed campaign to end judicial elections to the great movements of the 20th century may strike readers as aggrandizing judicial selection or trivializing the great movements to which it is compared. But therein lies the problem. To gain traction with the public, judicial selection must achieve the status of a movement. It bears emphasis that judicial elections themselves were the product of a movement that began with the administration of Andrew Jackson in the 1830s and gradually swept the nation. The theme of the judicial selection movement must look beyond "judicial independence," because the goal is not to protect judges so much as to protect the people whom judges serve. Our goal is to reassure the American public that they will get a fair shake in their courts, and, to that end, a more appropriate theme would be "to restore impartial justice."

• *Capitalizing on bellwether events:* Great social, political, or cultural movements calculated to win public support over time have depended for their success on bellwether events that galvanize public opinion and give their movement focus and drive. The civil rights movement had Selma; the anti-war movement had Kent State; and the clean air movement had Los Angeles. A movement to restore impartial justice by ending judicial elections has an ample supply of bellwether events at its disposal, but to date those events have not been adequately exploited. A disastrous election experience in Texas prompts critics to blame the partisan election system there and to recommend nonpartisan elections, only to have a disaster with nonpartisan elections in Wisconsin prompt critics to recommend a merit selection system, which could be countered by a disastrous retention election experience in the merit selection state of Tennessee. Rather than allowing these experiences to cancel themselves out, we need to recognize the common theme: Judicial elections are simply an unacceptable means of selecting judges. The Supreme Court's recent decision in *White* can be anticipated to spawn a whole new generation of election-related fiascos upon which a movement to end judicial elections should be able to

capitalize further.

• *Ensuring judicial qualifications:* If we are to convince the public that judges ought to be selected differently than are public officials in the political branches, it is essential to explain why, by highlighting the differences between them. One difference to which I alluded earlier is the almost universal requirement that the judges be lawyers, which highlights the specialized expertise that states expect judges — as distinguished from legislators and governors — to possess. That distinction could be drawn more vividly for the public's benefit if the credentials of all judicial candidates were publicly reviewed by independent deliberative bodies prior to gubernatorial nomination to ensure that all judicial candidates are capable and qualified. Although the independent deliberative body recommended here is similar to the merit selection commission, such commissions are sometimes criticized for not being sufficiently independent of the governor. To ensure a baseline of competence for all judges, it is imperative that the qualifications commission be truly independent of the appointing authority.

• *Enhancing alternative means to promote general judicial accountability:* If the public is to abandon its support for judicial elections because of the threat such elections pose to impartial justice, alternative means to promote judicial accountability must be more fully developed and promoted. Although systems of judicial discipline are in place in every state, they are typically under-publicized, and for that reason do little to reassure the public that judicial misbehavior will be adequately addressed. Judicial discipline can be an effective means to hold judges accountable for a variety of inappropriate behaviors ranging from chronic delays in decision making to abusiveness toward lawyers, litigants, and staff, to inebriation on the bench, to gender and racial bias. The public ought to be informed of that fact.

• *Restructuring the judicial selection process to provide prospective accountability for a judge's political and judicial philosophy:* To provide a means for assessing political acceptability in the absence of elections, I would propose a modified federal model of judicial selection for the states. Like the federal model, state judges could be nominated by the governor and confirmed by the state senate or some other subset of the state legislature. Judges so selected would then serve either during good behavior, or for a single, lengthy term. Three modifications are in order: First, as disenchanted as I may be with judicial elections, the problem judicial elections pose is far more acute at the point of re-election than at the point of initial selection. If the public's support for judicial elections is unwavering, I would be prepared to forego gubernatorial appointment as a method of initial selection in favor of an election if it meant that judges once so selected would not later be put at risk of losing their tenure because they made one unpopular decision. Second, regardless of whether judicial candidates are elevated to the bench by means of appointment or election, it is imperative that the judges so selected possess the competence, experience, character, and temperament needed to do the job well. Accordingly, judicial candidates, however initially selected, should be limited to those approved by an independent judicial qualification commission, as I described earlier. Third, the federal model of judicial selection, upon which my proposal is based, is currently enveloped in a fog of uncertainty as to just how "political" the appointments process should be. As elections have become the last remaining means to promote political accountability of state judges in the wake of the public's gradual acceptance of an independent judiciary and a rejection of other accountability-promoting devices that threaten the judiciary's autonomy, so too the appointments process may become the one remaining means to promote political accountability in the state. Viewed in this light, a political appointments process is inevitable, because the public and the political branches will be loath to relinquish their last remaining means of control over the court's political landscape. It is likewise desirable, because it affords some measure of prospective accountability without interfering unnecessarily with subsequent judicial decision making or institutional autonomy.

When I was presenting some of the ideas shared here at a conference held earlier in the year, a member of the audience raised his hand at the conclusion of my talk and indicated that he enjoyed my remarks, and that the only thing he would change is my name — to Don Quixote. I concede the point that current public support for judicial elections makes their elimination any time soon seem unlikely. Then again, I suspect that in the 1940s, when civil rights lawyers gathered around tables to discuss a strategy for overturning *Plessy v. Ferguson* and ending Jim Crow laws in their lifetime, the effort seemed equally daunting. I, for one, am optimistic.

Then again, so was Don Quixote.

A member of the IU faculty since 1998, Professor Geyh has served as director of the American Judicature Society's Center for Judicial Independence, reporter to American Bar Association commissions on judicial independence and (more recently) the public financing of judicial elections, consultant to the National Commission on Judicial Discipline and Removal, legislative liaison to the Federal Courts Study Committee, and a member of the American Law Institute. The author of numerous articles and book chapters, Geyh in his recent scholarship has explored issues relating to judicial administration, independence, and accountability.